Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

NO. 91-966
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
vs.
JERRY LEE MASON,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHERE THE VICTIM OF ARMED ROBBERY/AUTO THEFT IDENTIFIES TWO DIFFERENT INDIVIDUALS BOTH AS THE ONE AND ONLY PERSON WHO STOLE HIS CAR AND ONLY ONE OF THE INDIVIDUALS SO IDENTIFIED IS EVER BROUGHT TO TRIAL (THE OTHER, A MAN ACTUALLY FOUND BY POLICE IN THE STOLEN CAR, IS NEVER CHARGED WITH THE OFFENSE) AND THE EVIDENCE POSITIVELY IDENTIFYING THE MAN ACTUALLY FOUND BY THE POLICE IN THE STOLEN CAR IS, NOTWITHSTANDING DEFENSE COUNSEL'S REQUESTS FOR COMPLETE DISCOVERY PRIOR TO TRIAL NOT SHOWN TO DEFENSE COUNSEL UNTIL THE THIRD DAY OF THE JURY TRIAL AND DEFENSE COUNSEL THEN MOVES FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE, AND THE COURT GRANT'S THE DIRECTED VERDICT OF ACQUITTAL, DOES DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY AS SET FORTH IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF MICHIGAN BAR THE PROSECUTION FROM TRYING THE CASE AGAIN OR IS THE COURT'S GRANTING OF THE MOTION FOR DIRECTED VERDICT OF ACQUITTAL ABSENT THE JURY DECIDING THE FACTS OF THE CASE AN ERROR THAT SHOULD ALLOW THE PROSECUTION A SPECIAL RIGHT TO RETRY THE CASE NOTWITHSTANDING DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY?

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Now comes respondent, Jerry Lee Mason, by and through his attorney, Charles Bruce Idelsohn, J.D., and prays that no writ issue to review the judgment of the Court of Appeals of the State of Michigan.

This case was tried to a jury. On the third day of trial defense counsel learned that two different individuals had been positively identified by victim as the one and only person who stole victim's automobile at gunpoint. A man actually found by police in the stolen automobile was never prosecuted. At the close of the prosecution's proofs and based upon this surprising and exculpatory evidence defense counsel moved for a directed verdict of acquittal. The motion was granted.

The prosecutor filed a Claim of Appeal with the Court of Appeals of The State of Michigan. The Claim of Appeal was denied by the Court of Appeals. The Supreme Court of The State of Michigan refused to overturn the denial of the Claim of Appeal. The People of The State of Michigan petitioned The Supreme Court of The United States for a Writ of Certiorari. The instant response is in opposition to that petition.

The Court of Appeals of The State of Michigan dismissed the claim of appeal "for lack of jurisdiction" because Michigan law "does not permit an appeal by a prosecutor if further proceedings are barred by double jeopardy". The Court of Appeals of The State of Michigan relied upon the ruling of The Supreme Court of The United States in United States v Martin Linen Supply, 430 US 564; 51 L Ed 2d 642; 97 S Ct 1349 (1977) precluding further proceedings "in a criminal case where the trial court has entered an order directing a verdict in favor of the defendant".

Respondent agrees with this interpretation.

Petitioner attempts to distinguish between acquittal by a jury and acquittal by the court. Petitioner suggests that the right against double jeopardy should not apply when a defendant is acquitted following a successful motion for a directed verdict if the directed verdict is granted before the jury decides the case. Respondent disagrees.

Petitioner suggests that the trial court erred in granting the directed verdict and that there would have been jurors who would have convicted defendant if the said jurors were allowed to decide the case. It is now and was at trial respondent's contention that where two individuals are positively identified as the single perpetrator of a crime, and one of those individuals is never tried, then reasonable doubt exists as to the guilt of the individual who is tried.

In such a case acquittal is proper when acquittal is granted in response to a motion for directed verdict whether the motion is heard after the jury's verdict or before the matter is presented to the jury.

Consequently respondent prays that no writ issue to review the judgment of the Court of Appeals of the State of Michigan.

STATEMENT OF THE CASE

This case arises out of an alleged automobile hijacking in the City of Detroit.

The victim alleges that his car was taken from him at gunpoint outside of a party store. About one week later, the car was found. It's two occupants were arrested but neither was ever prosecuted.

Prior to a scheduled photographic show up procedure the victim was approached by a man and told by the man that Jerry Lee Mason, respondent herein, was the person who had taken victim's car and that the victim should tell that to the police. On the day scheduled for the photographic show up procedure, prior to the procedure, the victim did just that. He told the police that he, the victim, had been told by a man that Jerry Lee Mason had taken his car.

The officers then conducted the scheduled show up identification procedure. From a group of photographs presented to the victim, the victim "positively identified" the photograph of one of the men found in his car when the car was stopped by police. The person thus identified as the perpetrator of the alleged "hijacking" was never prosecuted.

Instead, following the photographic show up procedure, the police removed Jerry Lee Mason, respondent herein, from the Wayne County Jail [where he was awaiting further court proceedings for the armed robbery of a coney island restaurant (a matter on which he accepted a plea bargain offer and for which he is currently incarcerated in an Ionia, Michigan prison)], took him to the line up room at police headquarters, and conducted a live line up. The victim then picked Respondent, Jerry Mason from the live lineup. Petitioner makes no mention in its Statement of The Case about the "positive Identification" of the man actually found in the stolen car. Instead on page 8 of the Petition for Writ of Certiorari petitioner states:

> "Given that the victim, an eyewitness, positively identified the defendant (and that there was also other evidence)....."

It wasn't until the third day of a respondent's jury trial that defense counsel learned the details of the "positive identification" referred to above. At that time a police officer was called to the stand by the prosecution to testify. The officer's description of the identification procedures discussed above was defense counsel's first exposure to the full brunt of the show up evidence. During the officer's testimony defense counsel first learned that the person identified at the photographic showup identification procedure was in fact one of the people found in the stolen car.

The assistant prosecutor had, perhaps through inadvertence, neglected to include in discovery materials any of the showup identification procedure evidence. Nor had there been any earlier indication from the prosecutor's office that the alleged stolen car had been found, or that a man had been found in the alleged stolen car, or that that man had in fact been positively identified by the victim at a photographic showup identification procedure as the perpetrator of the alleged crime.

As a result of the evidence newly discovered at trial defense counsel for defendant then moved for a directed verdict of acquittal on the grounds that no reasonable juror could find defendant guilty beyond a reasonable doubt. Taking all the evidence presented by the prosecution in a light most favorable to the prosecution there was reasonable doubt that Respondent, Jerry Mason was in fact the perpetrator of the crime.

The prosecution objected. A lengthy exchange then occurred between the assistant prosecutor and the bench. During the exchange the court pointed out to the assistant prosecutor that even the court, sua sponte, could direct a verdict of acquittal at that point.

On behalf of The People of The State of Michigan the prosecutor filed a Claim of Appeal with the Court of Appeals, State of Michigan. The people's Claim of Appeal was denied by the Court of Appeals.

The Supreme Court of The State of Michigan refused to overturn the denial of the Claim of Appeal. The People of The State of Michigan petitioned The Supreme Court of The United States for the Writ of Certiorari. The instant document is a response to that petition.

REASONS FOR DENYING THE WRIT

Petitioner seeks to appeal from what petitioner refers to on page one (1) of its petition as an:

"...erroneous grant(s) of motion(s) for directed verdict..."

It appears that petitioner in its petition for a writ of certiorari is suggesting that the trial court erred in granting a directed verdict of acquittal. Petitioner urges the Supreme Court of The United States to overlook the double jeopardy provision of The Fifth Amendment to The Constitution of The United States and allow The People a chance to again prosecute respondent. Petitioner suggests that the case below provides an opportunity for The Supreme Court of The United States to allow two trials for the same offense under certain circumstances. Petitioner suggests that the trial court erroneously removed the case from the jury before the jury was allowed to decide upon a verdict and for that reason double jeopardy should not apply. Respondent disagrees.

Petitioner suggests that there are two types of directed verdict cases and that for double jeopardy purposes there is a difference between the two. In one type of case, according to petitioner, a directed verdict is handed down after a jury verdict is delivered. In the other type of case according to the prosecutor, the directed verdict is handed down without allowing the jury to decide the facts of the case.

Respondent takes the position that for purposes of determining whether or not the double jeopardy provision of the Fifth Amendment to The Constitution of The United States applies there is no difference between a directed verdict prior to jury verdict and a directed verdict following a jury verdict. Respondent respectfully submits to This Honorable Court that the trial court did not err in granting the directed verdict and that the law regarding double jeopardy should not be changed. More particularly Respondent urges that, if it is determined to be controlling under the facts of this case, that United States v Martin Linen Supply, 430 US 564; 51 L Ed 2d 642; 97 S Ct 1349 (1977) Linen not be overruled.

CONCLUSION

The right of the accused in a criminal trial to not be twice put in jeopardy is a right that should never be denied. We have come a long way since the framers of our constitution gave us the ability to live as free men and women in a free society. To deny a person the right to be free from multiple prosecutions is to undermine our splendid record of achievement as a free people and instead to send us back to a time when we wrestled with the yoke of oppression. We are not ready to move backward. The Fifth Amendment right against double jeopardy must not be eroded in a tide meant to wash clean the sins of the few. There must be finality in the criminal process. These United States must continue to stand as a beacon of liberty for the world to see and for the world to respect.